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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MARK BRNOVICH, in his official capacity
as Attorney General of Arizona, *et. al.*

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official capacity
as President of the United States, *et. al*

Civil Action No. 2:21-CV-1568-MTL

Defendants.

REPLY MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION
TO DISMISS THE COMPLAINT

1 This Court should dismiss Plaintiff's Third Amended Complaint pursuant to Federal
 2 Rules of Civil Procedure 12(b)(1) and 12(b)(6) because Plaintiff lacks standing, the
 3 Immigration and Naturalization Act (INA) bars review, and Plaintiff has failed to state a
 4 claim. Plaintiff's opposition fails to sufficiently address these shortcomings.

5 I. Arizona's Challenge to the Issuance of Notices to Report is Moot.

6 Plaintiff's challenge to the issuance of Notices to Report (NTRs) is moot because
 7 the policy directing their use has been discontinued and superseded by a new policy (Parole
 8 + ATD). *See* Defendants' Motion, ECF No. 146, (Defs' Mot.) at 5. Plaintiff argues,
 9 however, that the new Parole + ATD policy has a similar effect as the former policy, such
 10 that the challenge to the use of NTRs is not moot. *See* Plaintiff's Opposition, ECF No. 167
 11 (Pl. Opp.) at 3-5. Whether the policies have a similar effect, however, is irrelevant because
 12 the policy authorizing the use of NTRs has been superseded. Because there is no relief that
 13 this Court can order with regard to the NTR policy, Plaintiff's claims 9-13, to the extent
 14 they are based on the use of NTRs, should be dismissed. Alternatively, Plaintiff should
 15 amend its complaint to address the current policy.

16 II. Plaintiff Lacks Standing.

17 Plaintiff lacks standing to bring this lawsuit because it cannot articulate any actual
 18 or imminent injury. *See* Defs' Mot. at 5-7. Further, it has not established that any alleged
 19 injury is traceable to Defendants. *Id.* at 6-7. Plaintiff's arguments to the contrary are
 20 unpersuasive.

21 Plaintiff contends it has identified three bases for standing: (i) increased costs from
 22 incarcerating noncitizens, (ii) increased law enforcement costs from the pursuit of
 23 noncitizens, and (iii) increased costs of emergency medical services to noncitizens. Pl.
 24 Opp. at 13. Plaintiff does not specify, however, which of these alleged injuries derive from
 25 Defendants' now-discontinued use of NTRs, and which derive from Defendants' alleged
 26 parole policies. *See generally* Pl. Opp. and Plaintiff's Third Amended Complaint ("TAC").
 27 For this reason alone, Plaintiff has not met its burden to establish standing. *Wash. Envtl.*
 28 *Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) ("A plaintiff must demonstrate

1 standing for each claim [it] seeks to press and for each form of relief sought.”) (citing
 2 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

3 Furthermore, standing is substantially more difficult to establish when the
 4 challenged government action does not require or forbid any action on the part of the
 5 plaintiff. *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1254 (9th Cir. 2010) (citing
 6 *Summers v. Earth Island Institute*, 555 U.S. 488, 493-94 (2009)); *see also California v.*
 7 *Texas*, 141 S. Ct. 2104, 2117 (2021). Yet, Plaintiff argues that because its claims are
 8 procedural under the APA, and it is entitled, as a state, to “special solicitude” in the
 9 standing analysis under *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), the standing
 10 inquiry is “double relaxed”—such that the generalized harms it alleges confer standing. Pl.
 11 Opp. at 14-15. Not so. Although states sometimes may receive “special solicitude in [the]
 12 standing analysis” to assert procedural rights and protect “quasi-sovereign interests,” that
 13 does not obviate Arizona’s burden to establish each element of standing. *Massachusetts*,
 14 549 U.S. at 520; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding a
 15 plaintiff asserting “procedural injury” could not establish injury-in-fact absent a distinct
 16 “concrete injury”); *see also Arizona v. Dep’t of Homeland Sec.*, No. CV-21-00186-PHX-
 17 SRB, 2021 WL 2787930, at *6 (D. Ariz. June 30, 2021) (noting states subject to “regular
 18 inquiry”). Additionally, a “claim of procedural injury does not relieve Plaintiff[] of [its]
 19 burden—even if relaxed—to demonstrate causation and redressability,” *Whitewater Draw*
 20 *Natural Resource Conservation District v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir. 2021)
 21 (citing *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)). Plaintiff does not satisfy that
 22 burden here.

23 *A. Plaintiff Lacks Standing Because It Alleges a Generalized Injury.*

24 Plaintiff lacks standing because merely alleging that a particular policy increases
 25 immigration, in turn requiring the state to spend money on social benefits, does not confer
 26 Article III standing. *See* Defs’ Mot. at 7 (citing *Arpaio v. Obama*, 27 F. Supp. 3d 185, 202
 27 (D.D.C. 2014), *aff’d*, 797 F.3d 11 (2015) (a state does not suffer a cognizable injury when
 28 “a federal government program is anticipated to produce an increase in that state’s

1 population and a concomitant increase in the need for the state's resources."). Plaintiff tries
 2 to distinguish *Arpaio* on the grounds that it was relying on an inducement theory, whereas
 3 "the State here is alleging that Defendants are directly releasing immigrants into the United
 4 States." Pl. Opp. at 15. Plaintiff's argument suffers numerous flaws.

5 The *Arpaio* plaintiff's standing argument was not based solely on an inducement
 6 theory. The plaintiff, the sheriff of Maricopa County, contended that the defendants'
 7 Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of
 8 Americans (DAPA) programs caused injury—increased law enforcement costs—both
 9 directly because the government was declining to deport individuals who were already
 10 present in the county, and indirectly based on an allegation that DACA and DAPA induced
 11 illegal immigration. *Arpaio*, 797 F.3d at 167. The district court found that the plaintiff
 12 lacked standing because his alleged injury was both speculative, and because it was a
 13 generalized grievance. *Arpaio*, 27 F. Supp. 3d at 202. The Court of Appeals affirmed,
 14 finding that the plaintiff's alleged injury was speculative without addressing the
 15 generalized grievance basis for dismissal. *Arpaio*, 797 F.3d at 167-168. Similarly here—
 16 and contrary to Arizona's claim otherwise (Pl. Opp. at 15)—Plaintiff alleges its noncitizen
 17 population is increasing both because Defendants are directly paroling noncitizens into the
 18 country and because Defendants' policies are encouraging illegal immigration. *See, e.g.*,
 19 TAC at ¶ 147 ("Defendants' actions encourage a greater influx of unauthorized aliens into
 20 Arizona"), ¶ 148 ("Defendants' [] use of parole to allow hundreds of thousands of aliens
 21 to enter the United States, necessarily increases the number of unlawfully present aliens in
 22 Arizona"). Thus, contrary to Plaintiff's contention, *Arpaio* is on all fours with this case.
 23 Nor does *Arpaio* stand alone. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (*per curiam*)
 24 ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.").

25 *B. Plaintiff Lacks Standing Because Its Harms Are Speculative And It Cannot
 26 Establish Causation.*

27 Plaintiff's theory of standing depends upon multiple layers of speculation. First,
 28 Plaintiff assumes that noncitizens paroled into the country, and noncitizens allegedly

1 induced to cross the border illegally, are settling in large numbers in Arizona. Plaintiff has
 2 not pleaded any facts to support this allegation. In fact, Plaintiff admits it has no data to
 3 support this contention. Pl. Opp. at 17 (“Defendants do not break down alien release
 4 numbers by state, but there can be little doubt that thousands of aliens are being released
 5 into Arizona.”). In so doing, Plaintiff fails to meet the burden it bears to establish each link
 6 in the causal chain. *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (“the States
 7 must make a clear showing of each element of standing”) (cleaned up).

8 Second, Plaintiff speculates that Defendant’ parole practices have caused an
 9 increase in law enforcement and incarceration costs in Arizona. That argument also fails.
 10 To the extent that Plaintiff’s theory of harm with respect to increased law enforcement and
 11 incarceration expenses is based *not* on a theory that these noncitizens are violating state
 12 criminal laws, but instead on the theory that Arizona is incurring enforcement and
 13 incarceration costs associated with “the pursuit of suspected unauthorized aliens” (TAC at
 14 ¶ 147)—that claim is problematic in two respects. As an initial matter, a state cannot “arrest
 15 an alien for being removable absent any request, approval, or other instruction from the
 16 Federal Government.” *Arizona v. United States*, 567 U.S. 387, 410 (2012). Next, even if
 17 Plaintiff meant to suggest that it pursues suspected unauthorized noncitizens at the behest
 18 of the federal government, its claim that it suffers an injury from increased law enforcement
 19 and incarceration costs makes no sense. The gravamen of Plaintiff’s complaint is that
 20 Defendants are paroling too many noncitizens into the country. (Indeed, Plaintiff strangely
 21 claims in its opposition that it is not basing its standing argument on the contention that
 22 Defendant’s policies are increasing illegal immigration). But noncitizens paroled into the
 23 country are not deportable on that basis—that is, they would not be subject to arrest and
 24 incarceration, at the federal government’s behest or otherwise.

25 To the extent that Plaintiff’s argument is that Defendant’ parole practices have
 26 caused an increase in the immigrant population in Arizona, which in turn has caused an
 27 increase in law enforcement and incarceration costs in the state, this speculative argument
 28 has been soundly rejected. In *Arpaio*, the Court observed that even if DACA and DAPA

1 increase unlawful immigration, one cannot infer that the policies increase crime because
 2 “crime is notoriously difficult to predict.” *Arpaio*, 797 F.3d at 22. “Crime rates are affected
 3 by numerous factors, such as the local economy, population density, access to jobs,
 4 education, and housing, and public policies that directly and indirectly affect the crime
 5 rate.” *Id.* Thus, the Court concluded, “it is pure speculation whether an increase in unlawful
 6 immigration would result in an increase” in crime, and “where predictions are so uncertain,
 7 we are prohibited from finding standing.” *Id.*; *see also Whitewater*, 5 F.4d at 1015 (“the
 8 attenuation in this chain of reasoning, unsupported by well-pleaded facts, is worthy of Rube
 9 Goldberg”).

10 Third, to the extent Plaintiff is alleging that Defendants’ parole policies cause illegal
 11 immigration (which Plaintiff alleges in the TAC but appears to disavow in its opposition,
 12 *see* Pl. Opp. at 15), Plaintiff’s contention is entirely speculative. Plaintiff does not set forth
 13 any facts in its complaint to support this notion. *See generally* TAC. Instead, in its
 14 opposition, Plaintiff makes the more general claim that “[t]he laxer the enforcement, the
 15 greater the incentive to illegally immigrate.” Pl. Opp. at 14. To support this assertion,
 16 Plaintiff cites to the declaration of Mark Lamb, the sheriff in Pinal County, Arizona, filed
 17 in another lawsuit pending in this district. *Id.*

18 Plaintiff’s reliance on the declaration is problematic for several reasons. First,
 19 although Plaintiff claims it can cite to public materials outside the complaint because
 20 Defendants did so (Pl. Opp. at 14, FN 6), Plaintiff overlooks that it bears the burden to
 21 plead its allegations in the complaint. *Arpaio*, 797 F.3d at 21 (“[A]ssertions contained only
 22 in the briefs may not be used to expand the allegations of the complaint.”) (citation
 23 omitted). Second, Sheriff Lamb’s statement was submitted in a different case and
 24 concerned a different policy; it did not concern Defendants’ alleged parole policies.¹ *See*

25
 26 ¹ Sheriff Lamb, wrote “[I]n my professional opinion, the increase in incidents, and
 27 therefore increase in costs, my office is experiencing is at least in part directly related to
 28 announced changes in federal border enforcement and alien removal policies. A pause or
 significant decrease in ICE removals will serve to incentivize individuals to illegally cross
 the border into Arizona, because among other things it removes one of the chief
 consequences that deters such action.” *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, ECF

1 *Whitewater*, 5 F.4d at 1015 (holding the plaintiff cannot establish causation sufficient for
 2 standing by proffering an expert affidavit that contains conclusions without specific factual
 3 support tied to the policy being challenged.) Third, Sheriff Lamb provides only a lay
 4 opinion as to the cause of illegal immigration, and has not been proffered as an expert.
 5 Further, his opinion, like Sheriff Arpaio's, ignores the "myriad economic, social, and
 6 political realities that might influence an alien's decision to risk life and limb to come to
 7 the United States." *Whitewater Draw*, 5 F.4th at 1015 (cleaned up).²

8 Plaintiff's allegation that it suffers injury by incurring the cost of providing medical
 9 services to noncitizens similarly fails. The fundamental problem is that Plaintiff has not
 10 shown that Defendants' parole policies increase the noncitizen populations in its state. *cf.*
 11 *Arpaio*, 797 F.3d at 15. However, even if it did, Plaintiff's theory rests on an extremely
 12 speculative causal chain. Medical expenses, if they occur, would be the result of a series of
 13 events wholly unrelated to Defendants' parole policies, including noncitizens needing
 14 medical care, not paying for that care, healthcare providers requesting the states pay, and
 15 the states in fact paying without federal Medicare or Medicaid reimbursement. Plaintiff
 16 argues that a state may assert injuries based on "the predictable effect of Government action
 17 on the decisions of third parties." Pl. Opp. at 13 (citing *Dept. of Commerce v. N.Y.*, 139 S.
 18 Ct. 2551, 2565–66 (2019)). But because the effect of Defendants' alleged parole policies
 19 on noncitizens' decisions to seek medical care is far from predictable, Arizona cannot
 20 demonstrate standing. *See Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009) (when
 21 injury turns on third parties' actions, a plaintiff must show that the conduct has a
 22 "determinative or coercive effect upon the action of someone else").

23 Plaintiff similarly fails to sufficiently support its contention that Defendants' now-
 24 discontinued use of NTRs caused it any injury. Although Plaintiff claims that nearly thirty

25 17, Ex. N ¶ 8 (D. Ariz. March 12, 2021).

26 ² And, because a panoply of factors may contribute to unlawful immigration, Plaintiff
 27 cannot establish redressability. *Glanton ex. Rel ALCOA Prescrip. Drug Plan v.*
 28 *AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) ("There is no redressability, and
 thus no standing, where [...] any prospective benefits depend on an ... actor who retains broad
 and legitimate discretion the courts cannot presume either to control or to predict.")

1 percent of noncitizens issued NTRs absconded into the country (Pl. Opp. at 22), Plaintiff
 2 does not explain how the allegation confers standing. Plaintiff has not alleged facts to show
 3 that even if true, any absconders settled in Arizona, committed crimes in Arizona, went to
 4 hospitals in Arizona, or refused to pay for their care. Even if Plaintiff had alleged such
 5 facts, more critically, Plaintiff has not alleged any facts to show that the use of an NTR,
 6 rather than an NTA, meaningfully affected a noncitizen's decision to abscond, or
 7 subsequently commit a crime or seek medical care. Where causation and redressability
 8 hinge upon the choices of third parties, Plaintiff must adduce facts to show that those
 9 choices will be made in such a manner that will produce causation and permit redressability
 10 of the harm. "*Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C.
 11 Cir. 2004) (quoting *Lujan*, 504 U.S. at 562). Plaintiff has not done so here.³

12 Instead, Plaintiff speculates that several actions by Defendants—from defendants'
 13 temporary use of NTRs, Defendants' subsequent use of Parole + ATD (which is not even
 14 alleged in the complaint), and Defendants' use of parole in lieu of either detention or
 15 contiguous territory return authority—cause generalized injuries. This court has already
 16 rejected standing based on similar conjecture. *See Arizona v. Mayorkas*, 21-CV-00617,
 17 ECF No. 47 (*Arizona II*).

18 In *Arizona II*, Arizona sued several federal agencies and officials for implementing
 19 "the Population Augmentation Program," which it claimed increased Arizona's population
 20 via immigration. *Id.* at ECF No. 13, ¶¶ 1-12, 33, 61-65. In a separate cause of action,
 21

22 ³ Plaintiff's reliance upon *Arizona v. DHS*, No. CV-21-00186-PHX-SRB, 2021 WL
 23 2787930 (D. Ariz. June 30, 2021) (*Arizona I*) does not help them. In *Arizona I*, Arizona
 24 and Montana sued various federal agencies challenging guidance issued to ICE on the
 25 removal priorities. *Id.* at *2. The states claimed they suffered harm in the way of the cost
 26 of (1) community supervision of noncitizens released from prison with criminal
 27 convictions; (2) providing emergency medical care to noncitizens; and (3) providing
 28 education to unremoved noncitizens. *Id.* at *6. Although the Court found that the states had
 standing to sue based on the costs incurred supervising noncitizens who had committed
 crimes and were released, or about to be released, into the states instead of detained, *id.*,
 the court did so because of the specificity of the allegations alleged by the states. The states
 identified individuals who were released instead of deported and quantified the costs of
 their supervision. *Id.* By contrast, here, Plaintiff has not alleged any facts to take their
 allegations from speculative to concrete.

1 Arizona challenged Defendants' termination of work on the border wall, which it claimed
 2 resulted in a substantial increase in illegal entries by noncitizens. *Id.*, ECF 13 ¶¶ 78, 85, 89.
 3 This court rejected Arizona's argument that its alleged environmental and economic
 4 injuries, including emergency health care costs and costs associated with law enforcement,
 5 conferred standing. 21-CV-617, ECF 47 at 14. This court held that the APA does not
 6 authorize the amalgamation of discrete actions to provide standing to challenge it as a
 7 "program." *Id.* at 9. This same logic applies, as Plaintiff here has amassed together several
 8 claims, including Defendants' discontinued use of NTRs, Parole + ATD, and the release
 9 of noncitizens on parole, to claim generalized injuries without proof of traceability or
 10 redressability.

11 Plaintiff's claim that Defendants' alleged policies induce illegal immigration is
 12 similarly speculative. As in *Arizona II*, Plaintiff's "chain of reasoning" is marred by
 13 attenuation and ignores other economic, social, and political factors that might influence a
 14 noncitizen to risk life and limb and enter the United States illegally. *Id.* at 18. Because
 15 Plaintiff's claim of injury is more attenuated than in *Arizona II*, Plaintiff's complaint should
 16 be dismissed for lack of standing.

17 III. Plaintiff's Claims are Not Reviewable Under the APA.

18 A. *The Actions Plaintiff Challenge are Subject to Agency Discretion.*

19 Law enforcement decisions—including the prioritization of scarce resources,
 20 deciding when and whether to pursue removal, and whether to release noncitizens on
 21 parole—are subject to agency discretion and are thus not reviewable. *See* Defs' Mot. at 8-
 22 12; 5 U.S.C. § 701(a)(2). Yet, Plaintiff argues that that the "commands" of sections 1225(b)
 23 and 1182(d)(5)(A), "necessarily preclude the existence of agency discretion[.]" Pl. Opp. at
 24 6-7. Plaintiff's argument is without merit. The text of section 1182, and its particular use
 25 of "may," is plainly discretionary. Defs. Mot. at 11. Further, both case precedent and
 26 section 1225(b)'s legislative history makes clear that section 1225 does not eliminate
 27 executive enforcement discretion. *See infra* 14-16.

B. Sections 1225(b) and 1182(d)(5) Provide No Standard Against Which to Judge the Exercise of Discretion.

Plaintiff alternatively contends that even if the Government retains some law enforcement discretion, sections 1225(b)(2) and 1182(d)(5)(A) provide “meaningful standard[s] against which to judge the agency’s exercise of discretion.” Pl. Opp. at 6-9 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). Plaintiff’s reliance on two Supreme Court cases does not advance Plaintiff’s claims. See Pl. Opp. at 7-8 (citing *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015), and *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371 (2018)). As a preliminary matter, neither case concerns a law enforcement statute, and are therefore inapposite to *Town of Castle Rock*, in which the Supreme Court explained that “seemingly mandatory legislative commands” do not displace “the deep-rooted nature of law enforcement discretion.” *Id.*, 545 U.S. 748, 761 (2005). Further, the statutes at issue in both referenced cases set forth specific actions the agency must take and certain factors the agency must consider. Section 1182(d)(5), by contrast, does not address what factors constitute “urgent humanitarian reasons” or “significant public interest.” And, contrary to Plaintiff’s contention, section 1225(b)’s “shall be detained” language cannot provide a standard by which to judge Defendants’ parole decisions under section 1182(d)(5), because section 1225(b) does not limit or condition discretionary release on parole. Indeed, Congress *required* that noncitizens first fall within the scope of section 1225(b) in order to qualify for section 1182 parole at all. See 8 U.S.C. § 1182(d)(5)(A) (parole only available to “alien[s] applying for admission”). Nor can section 1182(d)(5)(A) provide a meaningful standard based on its requirement that parole be granted “on a case-by-case basis for urgent humanitarian reasons or significant public benefit,” because Congress never defined those terms, leaving them to the agency’s policy judgments. Cf. *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (barring “judicial review [of] those controversies which revolve around policy choices and

1 value determinations constitutionally committed for resolution to the halls of Congress or
 2 the confines of the Executive Branch”).

3 *C. Heckler Applies.*

4 In *Heckler v. Chaney*, 470 U.S. 821 (1985) the Supreme Court set forth the
 5 traditional presumption against reviewability for non-enforcement actions. Plaintiff argues
 6 *Heckler* does not apply here because it challenges a general policy rather than individual
 7 enforcement decisions, and because sections 1225(b) and 1182(d)(5) “provide sufficient
 8 ‘guidelines’ for judicial review.” Pl. Opp. at 9-13. Plaintiff’s argument fails for three
 9 separate reasons.

10 First, there are no “broad non-enforcement policies” governing parole at issue here.⁴
 11 Plaintiff has not identified any “non-detention policy,” but rather a series of individual
 12 parole decisions to which it objects as a matter of policy. Indeed, the actual statute and
 13 regulation that comprise the *written* “policies” governing parole, authorize releases, case-
 14 by-case, without limitations. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. 212.5(b). Further, the
 15 Parole + ATD guidance—which Plaintiff does not challenge in the TAC—likewise does
 16 not constitute a non-enforcement policy. Rather, it *adds additional enforcement criteria*
 17 that must be met prior to a noncitizen’s release. In addition to the pre-existing case-by-case
 18 statutory requirements, there must be lengthy time in custody and detention near capacity
 19 to permit use of Parole + ATD in a sector. *See* Ex. A to Defs’ Mot.

20 Second, Plaintiff’s gloss on *Heckler* is incorrect. *Heckler* was not confined to a
 21 single non-enforcement decision, but rather concerned the FDA’s broad programmatic
 22 refusal to undertake national enforcement initiatives. *See* 470 U.S. at 824. Under *Heckler*,
 23 the non-reviewability presumption applies to aggregated non-enforcement actions as much
 24 as single non-enforcement decisions.⁵

25
 26 ⁴ The non-enforcement decisions at issue concern the government’s discretion not to
 27 enforce the provisions for removal and detention in section 1225(b). Such discretion is
 necessitated by the “sheer physical impossibility,” among other factors, of detaining all
 noncitizens subject to Section 1225(b). *See Castle Rock*, 545 U.S. at 760.

28 ⁵ Plaintiff’s reliance on *ILWU v. Meese*, 891 F.2d 1374, 1378 (9th Cir. 1989), and *Nat'l*

1 Third, contrary to Plaintiff's contention, neither sections 1225(b) nor 1182(d)(5)
 2 contain "statutory language which suppl[ies] sufficient standards to rebut the presumption
 3 of unreviewability." The terms "urgent humanitarian reasons" and "significant public
 4 interest" are not defined in section 1182(d)(5), and they are inherently subjective terms.
 5 *See New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1214 (D.N.M. 2020) ("[8 U.S.C. §
 6 1182(d)(5)(A)] grants the Attorney General the discretion to parole asylum seekers for
 7 'significant public benefit.' [] This vague standard conceivably encompasses a wide range
 8 of public benefits, such as conserving resources otherwise spent on housing asylum seekers
 9 or allowing an individual to carry on their employment in the United States.").⁶

10 Finally, Plaintiff's hypothetical analogy to the Bureau of Prisons refusing to carry
 11 out sentences for "federal securities fraud crimes on policy/political grounds" is wholly
 12 inapt. Pl. Opp. at 13. There is no refusal to follow a statute based on "policy/political
 13 grounds" at issue here. Even if Plaintiff disagrees with the number of noncitizens released
 14 on parole, Plaintiff fails to identify any grant of parole not based on urgent humanitarian
 15 reasons or significant public interest, in violation of section 1182(d)(5)(A). And while

16 *Wildlife Fed'n v. EPA*, 980 F.2d 765, 773 (D.C. Cir. 1992), is misplaced. The plaintiffs in
 17 those cases challenged an "advisory opinion defining" a statutory term and the agency's
 18 "declared policy that it lacks jurisdiction over" activities at issue, *ILWU*, 891 F.2d at 1378,
 19 and "a regulation promulgated by the" EPA allowing it "discretion to refuse to initiate
 20 proceedings to withdraw a state's primary enforcement responsibility" for national
 drinking water standards, *Nat'l Wildlife Fed'n*, 980 F.2d at 767. Those cases thus found
 APA review over affirmative agency rulemaking and binding declarations of legal rights
 and obligations, not, as Plaintiff challenges here, aggregated individual non-enforcement
 decisions and guidelines for case-by-case application of heightened parole procedures.

21 ⁶ Additionally, this case is not similar to *Dunlop v. Bachowski* as Plaintiff claims. Pl. Opp.
 22 at 11, citing, *Dunlop*, 421 U.S. 560, 560 (1975). In *Dunlop*, the statute at issue required the
 23 Secretary of Labor to bring suit if his investigation "find[s] probable cause to believe [that]
 24 a violation ... has occurred[.]" *Id.* at 562. The Dunlap Court thus concluded, as Plaintiff
 25 points out, that "[t]he statute being administered quite clearly withdrew discretion from the
 26 agency and provided guidelines for exercise of its enforcement power." Pl. Opp. at 12,
 27 citing *Dunlop*, 421 U.S. at 834. But contrary to Plaintiff's contention, the statute at issue in *Dunlop*
 provided a standard against which to review the Secretary's compliance because "probable
 cause" is a legal standard with a long-established defined meaning. *See, e.g., Rodis v. City,
 Cty. of San Francisco*, 558 F.3d 964, 969 (9th Cir. 2009). By contrast, "humanitarian
 reasons" and "public interest," 8 U.S.C. § 1182(d)(5)(A) are subjective terms, which
 Congress never defined.

28

1 Parole + ATD adds the additional criterion of detention availability into the case-by-case
 2 determination to release eligible noncitizens on Parole + ATD, that criterion is not akin to
 3 a “policy/political” view, but rather to the considerations of “insufficient resources” and
 4 “sheer physical impossibility” that, among other factors, necessitate the availability of non-
 5 enforcement discretion co-existent with “shall” charge or detain commands in statutes. *See*
 6 *Castle Rock*, 545 U.S. at 760 (quotation omitted). The parole actions challenged here are
 7 committed to agency discretion and unreviewable under the APA.

8 *D. Section 1252(a)(2)(B)(ii) Precludes Review of Plaintiff’s Claims.*

9 Section 1252(a)(2)(B)(ii) also precludes review of Plaintiff’s claims. *See* Defs’ Mot.
 10 at 15. Plaintiff argues it is not challenging any individual decision to release noncitizens
 11 on parole, but rather a “programmatic shift in application of the parole statute.” Pl. Opp. at
 12 16 (citing *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 503 (9th Cir. 2018), *rev’d in*
 13 *part on other grounds*, 140 S. Ct. 1891 (2020)). Plaintiff’s reliance on *Regents* is misplaced.
 14 First, the *Regents* Court did not undertake any analysis under section 1252(a)(2)(B)(ii); it
 15 was in the context of section 1252(g) that the Court discussed the Government’s
 16 “programmatic shift” in policy. Moreover, the question in *Regents* was the reviewability
 17 of DHS’s termination of the DACA program, which was a “programmatic shift” in policy,
 18 affecting all current and future DACA recipients. *Id.* Here, by contrast, Plaintiff challenges
 19 an amalgam of individual parole decisions in an attempt to establish a de facto policy.⁷
 20 *Regents* is not “exactly this case,” as Plaintiff claims. Pl. Opp. at 16.

21 IV. Plaintiff Has Failed to State a Claim.

22 A. *Counts 9 and 12 Should be Dismissed.*

23 Defendants’ parole practices do not violate the detention mandates of section
 24 1225(b) or the parole provisions of section 1182(d)(5)(A). *See* Defs’ Mot. at 18-24. In
 25 opposition, Plaintiff relies heavily upon the Fifth Circuit’s decision in *Texas v. Biden*, 20

26

27 ⁷ Because the court lacks jurisdiction to review individual determinations by the Secretary
 28 that parole is warranted, the court also lacks jurisdiction over any challenge to a parole
 policy or procedure. Defs’ Mot. at 15.

1 F.4th 928, 942 (5th Cir. 2021), in support of its argument that Congress created “a de facto
 2 mandatory detention regime” when it amended section 1225(b). Pl. Opp. at 20-21. *Texas*
 3 does not apply here, however, because Defendants are not releasing noncitizens “en
 4 masse.” Further, the *Texas* holding was flawed in multiple respects, as are Plaintiff’s
 5 arguments here.⁸

6 In support of its argument that section 1225(b) mandates detention for “all
 7 noncitizens awaiting adjudication of their asylum claims,” Pl. Opp. at 24, Plaintiff relies
 8 upon *Jennings v. Rodriguez*. Pl. Opp. at 19. But *Jennings* did not resolve the extent to
 9 which section 1225(b)(2)(A) leaves discretion to parole to DHS, as the Court referred to
 10 that provision alternatively as both “mandat[ing] detention,” *id.* at 842, 844, 845, and
 11 “authoriz[ing] detention until the end of applicable proceedings.” *See id.* at 835-38. These
 12 alternative descriptions are unsurprising given that the question before the Court was
 13 whether noncitizens have a statutory right to periodic bond hearings under section 1225,
 14 rather than whether section 1225(b)(2)(A) “authorizes” or “mandates” detention. *Id.* at 842.
 15 The Court thus had no occasion to consider how DHS should implement section
 16 1225(b)(2)(A) when it cannot detain all inadmissible applicants for admission due to lack
 17 of appropriations from Congress.

18 Beyond *Jennings*, Plaintiff argues that the plain text of section 1225(b)(2)(A)
 19 mandates detention of virtually all noncitizens awaiting asylum hearings, as does its
 20 legislative history. Pl. Opp. at 24-29. Plaintiff is incorrect. Plaintiff argues that, “[t]he plain
 21 text of Section 1225(b) [] creates an unequivocal obligation to detain aliens awaiting
 22 adjudication of their asylum claim” and is “impervious to administrative discretion.” *Id.* In
 23 support of this “plain text” argument, Plaintiff relies upon various dictionary definitions of
 24 the word “shall,” and two cases, *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389 (2008)⁹ and

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 26 ⁸ The Supreme Court has granted certiorari. *Biden v. Texas*, No. 21-954, 2022 WL 497412,
 27 at *1 (U.S. Feb. 18, 2022).

28 ⁹ In *Holowecki*, the Court was tasked with interpreting the meaning of the word “charge”
 as used in the Age Discrimination and Employment Act. The Court acknowledged that
 often words mean what they seem—and noted, as an example, in a parenthetical, that

1 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)¹⁰. Pl. Opp. at
 2 24. Neither of these cases support Plaintiff's position.

3 Critically, neither case involved a law enforcement statute, and neither case
 4 presented occasion to apply *Town of Castle Rock*—where the Supreme Court held that
 5 “seemingly mandatory legislative commands” do not displace “the deep-rooted nature of
 6 law enforcement discretion.” *Id.*, 545 U.S. at 761. Thus, the Court will not construe a
 7 provision stating that law enforcement “shall” take some action as a “true mandate,” absent
 8 “some stronger indication from the...Legislature.” *Id.* (citation omitted). *See* Defs’ Mot.
 9 at 9-10. Plaintiff ignores *Castle Rock* and the other cases Defendants cites for this
 10 proposition. *See generally* Pl. Opp. Instead, Plaintiff argues that even if there were
 11 ambiguity in the meaning of the word “shall” as used in section 1225(b), the statute’s
 12 legislative history establishes that Congress intended “shall” to mean “must”. Pl. Opp. at
 13 24. Plaintiff is incorrect.

14 Plaintiff argues that because Congress, with the passage of IIRIRA in 1996,
 15 “replaced language that granted broad discretion about whether to detain with strict,
 16 unequivocal commands that aliens ‘shall be detained,’” Congress’s intent was clear. Pl.
 17 Opp. at 27. This argument is unpersuasive. In developing IIRIRA, Congress was well
 18 aware of the Executive Branch’s lack of capacity to detain every applicant for admission
 19 in removal proceedings. *See* Exhibit B to Defs’ Mot., Memorandum from Gene McNary,
 20 INS Comm’r, *Parole Project for Asylum Seekers at Ports of Entry and INS Detention* (Apr.
 21 20, 1992) at 1 (explaining that INS “has limited detention space” and that by adopting the
 22 parole project it would “be able to detain those persons most likely to abscond or to pose a
 23 threat to public safety rather than to base the detention decision solely or primarily on the
 24 availability of detention space.”); *and compare e.g.*, Senate Report No. 249, 104th Cong.

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 26 “shall” usually implies the intent to impose discretionless obligations—but nonetheless,
 27 courts should not accept the plainest meaning of a word if it “is in considerable tension
 28 with the structure and purposes of the [statute]”. 552 U.S. at 401.

¹⁰ In *Lexecon*, the Court observed that “shall” normally creates an obligation. 523 U.S. at 35. Even if true, normally is not the same as always.

1 2d Sess. 3 (Apr. 10, 1996) (Senate Report) (acknowledging more than “one million”
 2 immigration “apprehensions” annually every year since 1989), with IIRIRA § 386(a), 110
 3 Stat. 3009-653 (directing an increase in immigration-detention facilities to “at least 9,000
 4 beds” during fiscal year 1997). Yet, Congress declined to appropriate sufficient funds to
 5 detain every noncitizen described in Section 1225—then and now. Further, if Congress
 6 intended this amendment to compel mandatory detention, it is inexplicable that over the
 7 past 25 years, it took no action to clarify its intent, after no presidential administration since
 8 IIRIRA’s passage has enforced section 1225(b) in the manner suggested by Plaintiff. In
 9 short, section 1225(b)(2)(A) is therefore best read not as an “obligatory rule,” Pl. Opp. at
 10 19, but instead as an instruction that noncitizens *generally should* be detained pending
 11 removal proceedings. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995)
 12 (observing that, “[t]hough ‘shall’ generally means ‘must,’ legal writers sometimes use, or
 13 misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’”).

14 Yet, Plaintiff cites to a trio of Ninth Circuit cases for the proposition that section
 15 1225(b)’s use of the word “shall” compels mandatory detention. Pl. Opp. at 33.¹¹ But none
 16 of these cases stand for this proposition. Rather, in each case, the courts merely referred,
 17 in passing, to section 1225(b)’s “mandatory detention” provision, but never engaged in any
 18 analysis of whether it is mandatory without exception, particularly where detention
 19 capacity is lacking.¹² Indeed, even amongst the out-of-circuit cases that Plaintiff cites (*id.*
 20 at 32), the only one that focused upon whether section 1225 compels mandatory detention
 21 is *Texas v. Biden*—which, as argued above, was wrongly decided and is currently before
 22 the Supreme Court.

23 The cases, all out-of-circuit, to which Plaintiff cites for the proposition that
 24

25 ¹¹ Citing, *Aleman Gonzalez v. Barr*, 955 F.3d 762, 772, 774 (9th Cir. 2020), cert. granted
 26 sub nom. *Garland v. Gonzalez*, 210 L. Ed. 2d 1009 (Aug. 23, 2021); *Thuraissigiam v. DHS*,
 27 917 F.3d 1097, 1101 (9th Cir. 2019), *rev’d and remanded* 140 S. Ct. 1959 (2020); and
Sissoko v. Rocha, 509 F.3d 947, 949 (9th Cir. 2007).

28 ¹² For example, *Sissoko* was a *Bivens* case that merely mentioned Section 1225(b)’s
 mandatory detention as it related to a plaintiff’s fourth amendment claim. 509 F.3d at 949.

1 Defendants are paroling “en masse” and thus violating section 1182(d)(5) (Pl. Opp. at 33),¹³
 2 suffer the same problem. Merely because Defendants release more noncitizens on parole
 3 than Plaintiff would prefer, does not mean that such paroles are “en masse.” Further, these
 4 cases do not discuss *Castle-Rock* or consider whether detention capacity is a factor that
 5 may be considered in determining “urgent humanitarian reasons” and “significant public
 6 benefit.” Similarly, none of the cases that Plaintiff cites for the proposition that section
 7 1182(d)(5)’s parole authority is limited (Pl. Opp. at 32-33)—other than *Texas v. Biden*—
 8 consider the scope of such limits, particularly whether section 1182(d)(5) permits available
 9 detention capacity to be considered as a basis for finding “significant public benefit.”

10 Neither does Plaintiff’s reliance upon the legislative history of IIRIRA support its
 11 claim that Defendants are systematically violating section 1182(d)(5) by paroling “en
 12 masse.” Pl. Opp. at 25-29. Plaintiff argues that the House Judiciary Committee Report on
 13 IIRIRA “makes clear that Congress intended the amendment to Section 1182(d)(5) to limit
 14 the parole authority” because the report itself explained that amendment to Section
 15 1182(d)(5) was necessary because “in recent years, parole has been used increasingly to
 16 admit entire categories of aliens who do not qualify for admission under any other category
 17 in immigration law.” Pl. Opp. at 29 (citing H.R. REP. 104-469, 140). However, Plaintiff
 18 has quoted a report on proposed legislative language that never made it into law. The
 19 material Plaintiff quotes is from a policy statement of the House Judiciary Committee that
 20 Congress as a whole explicitly chose not to adopt, as evidenced by rejecting the provision
 21 it supports.¹⁴

22
 23 ¹³ Citing *Cruz-Miguel v. Holder*, 650 F.3d 189 (2d Cir. 2011); *Delgado-Sobalvarro v. Att’y Gen.*, 625 F.3d 782 (3d Cir. 2010); *Tineo v. Ashcroft*, 350 F.3d 382, 387 (3d Cir. 2003);
 24 and *Texas v. Biden*.

25 ¹⁴ Plaintiff’s quoted language is from House Report 104-469, reporting H.R. 2202. Section
 26 523 of H.R. 2202 would have sharply limited the parole authority to only certain specified
 27 humanitarian or public interest situations. See <https://www.congress.gov/104/crec/1996/09/24/CREC-1996-09-24-pt1-PgH10841-2.pdf>
 28 at 77-78. However, Congress did not enact this provision into law. Rather, in the
 conference committee that resulted in the 1996 IIRIRA legislation, the House generally
 receded to the much more limited changes to INA section 212(d)(5) found in the Senate
 bill, S. 1664, including the case by case requirement. See

1 DHS's parole regulations provide for parole "only on "only on a case-by-case
 2 basis," for "urgent humanitarian reasons or significant public benefit," and after
 3 determining that the noncitizen "present[s] neither a security risk nor a risk of absconding."
 4 8 C.F.R. 212.5(b). Those regulations adhere to the statutory text. *See* 8 U.S.C.
 5 1182(d)(5)(A).¹⁵ In making those determinations, DHS must of course account for its
 6 actual ability to physically detain. But that does not make its decisions any less case-by-
 7 case. Indeed, every presidential administration since IIRIRA was passed has construed
 8 Section 1182(d)(5)(A) to permit parole based in part on available detention resources,
 9 which Plaintiff fails to address. *See* Defs' Mot. at 20-22, Exhibits A-F. Nor does Plaintiff
 10 address the fact that numerous courts, post IIRIRA, have acknowledged and upheld the
 11 practice of considering detention capacity when making parole decisions. *See* Defs' Mot.
 12 at 22 (citing *Padilla v. ICE*, 953 F.3d 1134, 1145 (9th Cir. 2020), *vacated on other grounds*,
 13 141 S. Ct. 1041 (2021); *Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 1377, 1382 (S.D. Fla.
 14 2002), *aff'd*, 321 F.3d 1336 (11th Cir. 2003)). Plaintiff cannot address this because there is
 15 no workable solution for how Congress could possibly have intended sections 1225(b) and
 16 1182(d)(5) to compel detention for all but a few select noncitizens encountered at the
 17 border, when Congress has never appropriated sufficient funds to realize this alleged
 18 intention.

19 Plaintiff attempts to reconcile this reality by arguing that Congress created section
 20 1225(b)(2)(C)—the contiguous return authority—to act as a safety valve of sorts, allowing
 21 the federal government to require noncitizens arriving on land at the Southern border to be
 22 returned to Mexico while their removal proceedings are pending. Pl. Opp. at 20. But the
 23 contiguous-territory authority is not an alternative option for many individuals potentially
 24 subject to detention under section 1225, as it is limited to noncitizens who *arrive by land*

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 26 <https://www.congress.gov/104/crec/1996/09/24/CREC-1996-09-24-pt1-PgH10841-2.pdf>
 27 at pg. H10882.

28 ¹⁵ Similarly, the policy document providing for Parole + ATD—which Plaintiff challenges
 29 despite the fact that it is not part of the operative complaint (Pl. Opp. at 21)—provides that
 30 whether to use Parole Plus must be assessed "on a case-by-case basis." Ex. A at 1-2.

1 via Mexico or Canada, and not those who arrive by boat or plane. Yet, under Plaintiff's
 2 reasoning, all such individuals must be detained, and cannot be paroled, even if DHS lacks
 3 any means of detaining them. *See* Defs' Mot. at 24. Plaintiff tellingly fails to address this
 4 problem. *See generally* Pl. Opp. In short, Defendants' parole practices are consistent with
 5 the discretionary authority vested in DHS by the statute under longstanding interpretation
 6 by the agency and courts.

7 *B. Count 10 Should be Dismissed.*

8 Plaintiff has failed to state a claim under the APA because it has not identified any
 9 ongoing, specific policy that it is challenging. *See* Defs' Mot. at 24-25. In its opposition,
 10 Plaintiff responds by arguing that is "has validly alleged a 'plausible' claim that an actual
 11 policy of increasing use of parole exists," Pl. Opp. at 1, and at the same time, "[w]hether
 12 the Policies exist [] is a factual question." Pl. Opp. at 34. In support of this argument,
 13 Plaintiff cites to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Warth v. Seldin*, 422 U.S.
 14 490, 501 (1975), for the unremarkable proposition that on a motion to dismiss courts must
 15 accept as true all allegations in the complaint. Pl. Opp. at 1, 34. But, Plaintiff ignores the
 16 critical holding of *Iqbal* that "[w]here a complaint pleads facts that are merely consistent
 17 with a defendant's liability, it stops short of the line between possibility and plausibility of
 18 entitlement to relief." *Id.*, 556 U.S. at 678. That is all that Plaintiff has done here. Plaintiff
 19 argues that because there was supposedly a three-thousand-fold increase in the number of
 20 noncitizens paroled between the last month of the Trump administration and December
 21 2021 (Pl. Opp. at 1, 35)—figures that appear nowhere in the TAC—*ipso facto*, the
 22 government must have a specific parole policy in place, and it must be abdicating a case-
 23 by-case consideration of parole. *Id.*¹⁶ But as explained in Defendants moving papers, that
 24 reasoning fails. *See* Defs' Mot. at 25.

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 28 ¹⁶ *See* TAC at ¶ 137 ("Releasing this many arriving aliens into the interior necessarily
 means that the government is violating Congress's commands in the INA.").

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*C. Plaintiff's Eleventh Cause of Action Fails Because Notice and Comment Was
Not Required.*

Plaintiff's eleventh cause of action, in which Plaintiff claims Defendants violated the APA by not subjecting their alleged parole policies to notice and comment, fails for two reasons. First, Plaintiffs have not identified any "rule" that they challenge, but merely call-out what they view as unlawful parole decisions in aggregate. *See* Defs' Mot. at 12-13, 26. Second, to the extent there is any such "rule," it is nothing more than a general statement of policy. *See id.* at 26-27. As to the first argument, Plaintiff responds by arguing that the "[t]he November Memo announces a drastic expansion of the government's use of its parole authority." Pl. Opp. at 34. But, even if that were true, Plaintiff does not challenge the November Memo in the TAC. *See generally* TAC. Instead, it challenges the use of NTRs, which practice was discontinued as a result of the November Memo. But as noted above, a plaintiff cannot augment its complaint via a brief. *Arpaio*, 797 F.3d at 11, 21.

As for the second argument, Plaintiff claims "Defendants are talking out of both sides of their mouth." Pl. Opp. at 35. Plaintiff questions how Defendants can both deny the existence of a particular parole policy and claim that it is a general policy. *Id.* Plaintiff ignores that Defendants' argument is tied to Plaintiff's allegations in the TAC and is confined to the motion to dismiss. Thus, Defendants characterized the alleged parole policy as a "general statement of policy" rather than a concrete rule, because Plaintiff described it as such in the TAC. *See e.g.* TAC at ¶ 117 (describing Defendants' parole "[g]uidance sent to border"), ¶ 127 (complaining about interim *guidance* issued by DHS on February 18, 2021, permanent *guidance* issued on September 30, 2021, the termination of MPP, and the abandonment of the construction of the border wall), ¶ 137 (complaining about DHS's alleged "open-border policies"). More to the point, however, Plaintiff's alleged harms do not stem from any challenged policy, but from the existence of the parole statute and regulations. As such, it could be addressed only by eliminating the Secretary's discretionary authority to parole or otherwise release noncitizens into Arizona. But any such challenge to the legality of the parole statute and regulation, implemented in 1996, is

1 long since time-barred, so no order of this court can set aside either provision. *See* 28
2 U.S.C. § 2401(a); *Wind River Min. Corp. v. United States*, 946 F.2d 710, 712 (9th Cir.
3 1991) (applying six year statute of limitations to civil suits against the United States).

4 *D. Plaintiff Does Not Dispute that Count 13 Should Be Dismissed.*

5 Plaintiff does not dispute that count 13 should be dismissed. *Jenkins v. Cnty. of*
6 *Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (dismissing causes of action as
7 abandoned where plaintiff did not oppose dismissal in her opposition).

8 **CONCLUSION**

9 For all these reasons and those set forth in Defendants' moving papers, Plaintiff's
10 Third Amended Complaint should be dismissed.

11

12 Date: March 15, 2022

Respectfully submitted,

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